SOURIAMAH A/P MARITHA MUTHA PILLAI

v.

THERESIA A/P ANTHONYSAMY & ANOR.

HIGH COURT MALAYA, TAIPING
TUAN ZULKEFLI BIN AHMAD MAKINUDIN JC
[ORIGINATING SUMMONS NO. 24-68-94]
2 DECEMBER 1994

LAND LAW: *Recovery of possession of land - Summary procedure - Whether defendants entered into or remained in occupation without license or consent - Circumstances under which defendants entered into occupation - Whether summary procedure appliable - Issues of law and fact - Rules of High Court 1980, O. 89*

PRACTICE & PROCEDURE: *Summary procedure for recovery of possession of land - When applicable - Rules of High Court, 1980, O. 89 - Triable issue of law and fact - Failure on part of plaintiff to disclose fully in its affidavit the whole of relevant circumstances how land illegally occupied by defendants - Whether fatal to plaintiff's case.*

This was an application by the plaintiff to recover possession of a piece of land held under Lot 011860 No. GM 2837 Mukim Bagan Serai, Daerah Krian, Perak occupied by the two defendants through summary procedure under O. 89 of the Rules of the High Court, 1980.

Held:

[1] In order for the plaintiff to succeed in her application by way of summary procedure under O. 89 of the Rules of the High Court, 1980 it is paramount upon her to show that the defendants in occupying the land had entered into or remained in occupation without her license or consent or that of any predecessor in title of her. In this application there was no evidence to that effect.

[2] In the circumstances of this case, the plaintiff's application for summary judgment was dismissed with costs as the application should not be brought in a summary way under O. 89 of the Rules of the High Court 1980.

[Plaintiff's application for summary judgment to recover land dismissed with costs].

Cases referred to:
Chin Wing Wa @ Chew Weng Wah & Ors. v. Ong Beng Cheng [1994]1 CLJ 313 ***(foll)***
Bohari bin Taib & Ors. v. Pengarah Tanah Galian Selangor [1991]1 MLJ 343 ***(foll)***

Legislation referred to:
National Land Code
Rules of High Court 1980, O. 89 r. 3(b)
Small Estates (Distribution) Ordinance 1955

For the plaintiff - Dominic N. Belavendram; M/s. Darshan Singh & Co.
For the defendant - Roy Prabhakaran; M/s. Prabhakaran & Assoc.

JUDGMENT

Zulkefli bin Ahmad Makinudin JC:

This is an application by the plaintiff to recover possession of a piece of land held under Lot 011860 No. GM. 2837 Mukim Bagan Serai, Daerah Krian, Perak ['The Land'] occupied by the two defendants through summary procedure under O. 89 of the Rules of the High Court, 1980.

The plaintiff in her affidavit in support of the application averred that she is the registered owner of the Land as from 7 December 1993 by virtue of the order of the High Court at Ipoh Originating Summons no. 398/81 dated 19 June 1993 vesting a separate title to it under an application for partition of the Land. The plaintiff stated that she was the sole owner of the Land and no one else had any interests on the Land. The plaintiff alleged both the first and second defendants had illegally erected wooden houses each on the Land. In the case against the second defendant the plaintiff claimed only a portion of the wooden house erected was on plaintiff's Land. Both the first and the second defendants had occupied the Land without paying any rent. The plaintiff went on to state that she believed there was no predecessor in title of her who could have consented to both the defendants erecting their houses on the Land.

The plaintiff also averred that on two separate occasions her son and husband had objected to both the defendants erecting their houses on plaintiff's Land and police reports to this effect were lodged. The plaintiff alleged that it was not disputed that both the first and second defendant had rights to ownership of undivided shares on the land lot No. 011861 GM 2838 Mukim Bagan Serai, Daerah Krian, Perak which is a lot adjacent to plaintiff's Land. On 24 December 1993 and 18 January 1994 the plaintiff through her solicitors issued a notice to quit to both the defendants respectively requiring them to give up vacant possession of the said Land. Again on 16 March 1994 the plaintiff through their solicitors issued a notice to quit to both the defendants. The plaintiff further averred that both the first and second defendants were occupying the Land illegally, without her consent or agreement. The plaintiff also stated that she had no knowledge of the persons occupying the Land who were not named in the originating summons apart from the defendants.

The first defendant filed an affidavit in reply whereby she stated that she was not aware of the fact that the plaintiff had obtained an order of partition of the Land and vesting a separate title to it *vide* the said High Court at Ipoh Originating Summons no. 398/81 dated 19 June 1993 and that the plaintiff is now the registered owner of the Land. The first defendant stated she had made a search at the Registry of the High Court, Ipoh and discovered that the plaintiff in the said High Court at Ipoh Originating Summons no. 398/81 had joined in the Pegawai Pentadbir Pusaka Malaysia (Official Administrator Malaysia) to represent the first defendant interests in the estate of her deceased father in-law. The first defendant claimed neither the plaintiff nor the Pegawai Pentadbir Pusaka Malaysia called or informed her of the application for the partition of the Land by the plaintiff. The first defendant believed that the application for partition by the plaintiff was made in preference of one party and to the benefit of the plaintiff only as the plaintiff had obtained more portion of the land then the first defendant after the partition and vesting of the separate title to it.

The first defendant also averred that the said Land was originally held under Land title no EMR 7828 Lot 6762 and EMR 7829 Lot 6763 and was jointly held as undivided shares by the first defendant's father in-law and three others. The first defendant in her affidavit exhibited a copy of the said Land title as Exhibit 'S1'. The first defendant further stated that she and her family had been staying on the land well over 20 years. All the predecessors in title of the plaintiff were aware that the house was built on the Land and that the first defendant's deceased father in law and her deceased husband were the persons who had built the house on the Land. The first defendant went on to state she had in 1984 made an application and obtained Letters of Administration under the Small Estates (Distribution) Ordinance 1955 in respect of the Land. The first defendant further alleged that some of the beneficiaries of the co-proprietorship had sold their shares on the Land to the plaintiff and the plaintiff had since then applied for partition of the Land and obtained a separate title vide the said High Court at Ipoh Originating Summons No. 398/81.

The first defendant further averred that she had an equitable interest on the Land and entitled to occupy it as during the time the said Land was held under Co-proprietorship she had expended large sums of money and improved the Land. The first defendant stated that at the time the plaintiff bought the Land she was well aware of the first defendant occupying the Land and the house built thereon and therefore had bought the Land with the benefit and burden on it. The first defendant went on to state as she was the co-proprietor of the land she need not have to pay any rentals and in fact no rentals had ever been demanded from her. The first defendant also stated that she intended to apply to the Court subsequently to set aside the order of partition granted by the High Court at Ipoh Originating Summons no. 398/81.

The second defendant in his short affidavit in reply averred that he would not be making any objection on the plaintiff's application provided there is a Court order made to dismantle his house. He stated that only a small portion of his house was on plaintiff's Land. The second defendant claimed his house had been erected on the Land about 40 years ago. The second defendant further stated he needed a Court order to dismantle the house so that he could thereafter make an appeal to the Local Authority to allow him to rebuild his house on the portion of land belonging to him.

The plaintiff put up a supplementary affidavit to state that at the time the High Court at Ipoh Originating Summons No. 398/81 was made, the first defendant had not yet taken the Letters of Administration of the estate of her deceased husband and hence any order made by the Court shall be final and conclusive. The plaintiff also stated the question of equity did not arise in this case as regards the first defendant's expenditure on improvement on the land as what was expended was on her own doing. Equity could only be raised if there existed an agreement between the two parties or if the plaintiff had induced the second defendant into expending on the land, which was not in this case. The plaintiff also in her supplementary affidavit strongly challenged the fact the first defendant possessed the Letters of Administration as claimed because what was appended as Exhibit 'S2' by the first defendant was in fact only an order for the distribution of the estate under Small Estate (Distribution) Ordinance 1955 and not Letters of Administration.

Encik Dominic appearing for the plaintiff in his main thrust of argument before the Court submitted that the plaintiff being the registered owner of the said Land by virtue of the High Court at Ipoh Originating Summons no. 398/81 had an indefeasible title to the land under the provision of the National Land Code. The new grant for the Land under the said Lot 0111860 No. GM. 2837 is a public document and that the first and second defendant had no right to question the validity of the title. It was further submitted for the plaintiff that the order for the grant of the partition of the Land by the High Court at Ipoh was not an issue for both the defendants to litigate under the present application by the plaintiff. The plaintiff contended that she had given the requisite notice to quit to both the defendants and the existence of the houses on the land and their continued presence on the land would tantamount to each of them being a trespasser. Although the defendants claimed that they were protected by equity, the learned Counsel for the plaintiff submitted that equity did not arise here. The principles of equity are not provided for under the National Land Code, and for equity to intervene there must be evidence of some inducement or encouragement by the plaintiff or expectation held out by the defendants on the strength of which they had expended money on the land. Such evidence was absent here.

Encik Roy Prabhakaran appearing for the first defendant submitted that this case did not come within the scope of O. 89 which is applicable only to squatters or trespassers who were in occupation of the land illegally. The Counsel for first defendant submitted that she

had never been a tenant of the predecessor in title of the plaintiff and neither was she a licensee of the plaintiff. The status of the Land in question before the grant of the order of partition by the High Court at Ipoh Originating Summons no. 398/81 was that it was held under co-proprietorship and it was jointly owned by the first defendant's deceased father in law and three others before the plaintiff bought the land from some of the beneficiaries of the co-proprietorship. The plaintiff knew all along that first defendant was staying on the land. It is the contention of the first defendant that there was the need to distinguish between licensee and co-proprietorship as in the first defendant's case. The application of O. 89 it was submitted is purely to cases of trespassers or licensee where a notice has been issued to revoke the license.

Having perused all the affidavits filed in this application and having considered the arguments advanced on behalf of both parties, I am of the view that in the circumstances of this particular case this proceeding should not be brought in a summary way under O. 89 of the Rules of the High Court 1980. I therefore dismiss this application with costs.

In refusing the order for both the first and second defendants to give up vacant possession of the Land I take the view that both the first and second defendants are not trespassers. In order for the plaintiff to succeed in her application by way of summary procedure under O. 89 it is paramount upon her to show that the defendants in occupying the land had entered into or remained in occupation without her license or consent or that of any predecessor in title of her. In this application I could not find any evidence to that effect.

Although the plaintiff contended that she had an indefeasible title to the Land by virtue of the order of the High Court at Ipoh Originating Summons no. 398/81, I am of the view that the attending circumstances prior to the granting of the said order should be given due consideration for the purposes of determining the propriety of the plaintiff application under O. 89 of the Rules of the High Court 1980. In this case from the evidence through the affidavits filed, the first and the second defendants have raised triable issues. In the Supreme Court case of *Chin Wing wa @ Chew Weng Wah & 3 Ors. v. Ong Beng Cheng* [1994]1 CLJ 313 Tan Sri Dato' Haji Mohd. Azmi SCJ in delivering the Judgment of the Court at p. 317 had this to say:

> The summary procedure under O. 89 is governed by the same principles as those under O. 14 RHC 1980. To entitle a defendant to a trial, all he need to do is to show that there is a triable issue of law or fact. It is only in clear cases of trespassing that a summary order can be made under O. 89.

In this application I find that both the defendants prior to the order of the High Court at Ipoh Originating Summons no. 398/81 have never been trespassers on the land. Both the defendants and their families have been on the Land for continuous period over the years. They had built houses on the Land by virtue of the fact they had inherited interests on the Land which was held under co-proprietorship in which each of the original owners of the land were entitled to possession and enjoyment of the whole Land. It is not in dispute that the Land in question in this application by the plaintiff was part of a bigger portion of land held in undivided shares in the Land title no. EMR 7828 Lot 6727 and EMR 7829 Lot 6763 before the order of the High Court at Ipoh Originating Summons no. 398/81 granting its partition. The plaintiff knew all along both the defendants were staying on the land and had houses built on it.

The averment by the plaintiff in her affidavit that she had objected to both the defendants erecting the houses on the land and lodging police reports against them appears one sided and misleading to me as if the houses had been built on the land after the plaintiff had

obtained its partition from the Court. The truth is that the houses had been on the land since the time it was held under co-proprietorship in the form of the holding of undivided shares of a bigger portion of land held under land title No. EMR 7828 Lot 6762 and EMR 7829 to 6763. In this regard I also find in this case the plaintiff has failed to comply with r. 3 (b) of O. 89 by her failure to disclose fully in its affidavit in support of the application, the whole of the relevant circumstances how the Land came to be illegally occupied by the defendants before and after the grant of the Order of partition by the High Court at Ipoh Originating Summons no. 398/81. The Supreme Court decision in the case of *Bohari bin Taib & Ors. v. Pengarah Tanah Galian Selangor* [1991]1 MLJ 343 may be cited as the authority for the proposition that a failure to disclose fully in its affidavit in support of the application under O. 89 the whole of the relevant circumstances how the land came to be illegally occupied by the defendants is fatal to the plaintiff's case. In *Bohari's* case the respondent the Pengarah Tanah Galian Selangor was found to have failed to comply with r. 3(b) of O. 89 by his failure to disclose fully in his affidavit in support of his application, the whole of the relevant circumstances how the lands came to be occupied by the appellant both before and after the three-year period of TOL and why the approval of the Executive Council to the alienation of the lands to the farmers was neither exhibited nor implemented.

As regards the issues of whether the first defendant had a valid Letter of Administration or not during the period the plaintiff was taking steps to get an order of partition of the Land from the Court and as of whether the first defendant should be called as a party or informed of the proceeding for the partition of the Land before the Court, I hold that these are triable issues. If there is a truth in the allegation of the first defendant that she had a valid Letter of Administration at the time the plaintiff was taking steps to partition the land then it calls into question the validity of the ownership by the plaintiff of the said land. It is not known then whether the plaintiff in applying to the Court for the partition of the land vesting into it a separate title had duly complied with the statutory requirement of the procedure for the partition of land as provided under Part Nine Chapter 2 of the National Land Code.

In the circumstances of this case it is my view that this application should not be brought in a summary way under O. 89. I therefore dismiss the application with costs.